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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 246

BRUNETTO CHEESE MANUFACTURING CORP., C. & F. CHEESE DISTRIBUTORS, INC., FALCONE DAIRY PRODUCTS, INC., J. J. GIAMMALVO, INC., M. MAGGIO CO., POLLIO DAIRY PRODUCTS CORP., SORRENTO CHEESE COMPANY, INC., SUNBURY CHEESE COMPANY, INC., and ITALIAN FRESH CHEESE MANUFACTURERS ASSOCIATION, INC.,

Petitioners,

v.

JOHN W. GARDNER, Secretary of Health, Education and Welfare of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on February 4, 1966. Rehearing was denied on March 23, 1966.

Citations to Opinions Below

The order of the respondent, dated December 15, 1964, filed December 21, 1964, was published in the Federal Register of December 22, 1964, and is printed in Appendix

B hereto, *infra*, page 28. The opinion of the Court of Appeals (R. 207b) is also printed in Appendix B hereto, *infra*, page 25, and is reported in 356 F. 2d 874.

Jurisdiction

The judgment of the Court of Appeals was entered on February 4, 1966 (R. 211b). Rehearing was denied on March 23, 1966 (R. 247b). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether the chief purpose of the statute under which respondent issued his order—to promote honesty and fair dealing on behalf of the consumer—has been nullified by an unreasonable and arbitrary order based upon insubstantial evidence.

Statutes Involved

The statutory provisions involved are sections 401, 403 and 701 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, 1055, as amended, 70 Stat. 919; 21 U.S.C. §§ 341, 343 and 371. They are printed in Appendix A, *infra*, pages 19 to 24.

Statement

Petitioners, fresh cheese manufacturers of the northeastern United States, and their trade association, seek review of the judgment of the Court of Appeals, affirming the order of respondent, which promulgated definitions and standards of identity for "low moisture mozzarella" cheese. The Court of Appeals said that it could be found that the order of respondent was based on substantial evidence.

The regulations properly establish standards for genuine mozzarella cheese as manufactured by petitioners, and improperly for a new, different and distinct cheese manufactured by midwestern producers as "low moisture mozzarella."

History:

On March 15, 1956, there was published in the Federal Register (21 F. R. 1657) a notice of proposals to adopt definitions and standards of identity for mozzarella cheese. The notice recited that the petition had been filed by the National Cheese Institute, Chicago, Illinois, setting forth proposals to adopt definitions and standards of identity for mozzarella cheese and part-skim mozzarella cheese. The proposed definitions and standards provided that mozzarella cheese "contains more than 52% and not more than 58% of moisture, and its solids contain not less than 43% of milk fat." The proposed definition and standard of identity for part-skim mozzarella cheese provided that it conforms to the standard of identity for mozzarella cheese "except that it contains more than 52%, but not more than 60% of moisture, and its solids contain less than 43% of milk fat but not less than 30%." The respondent invited all interested parties to present their views in writing regarding the published proposals.

On July 26, 1956, respondent made a determination, which was published on August 1, 1956 (21 F. R. 5747), that no standards be adopted for mozzarella and part-skim mozzarella cheese.

On January 23, 1957, there was again published in the Federal Register a second notice of proposals of the National Cheese Institute to adopt definitions and standards of identity for mozzarella cheese and part-skim mozzarella cheese (22 F. R. 428).

These new proposals were radically different from the original proposals. While the original proposal provided that the minimum moisture is 50% and the maximum 58%

in mozzarella cheese, and a 52% minimum and a maximum of 60% in part-skim mozzarella cheese, the new proposed definition completely reversed this so that the definition and standard of identity of mozzarella cheese as secondly proposed would specify a maximum of 52% moisture content.

On September 30, 1957, respondent announced that upon consideration of all information available, he again denied the petition and ordered that the proposed standards be not adopted (22 F. R. 7906).

In the interim between the two cited proposals, the Legislature of New York State, after hearings, enacted legislation establishing definitions and standards of identity for mozzarella and part-skim mozzarella cheese (Chapter 625, Laws of 1956). These standards provided for a minimum moisture content of 50% and maximum of 58% of moisture. After further investigation and hearings by the New York State Joint Legislative Committee on Imitation Food Products and Problems, the definition for mozzarella chesse was amended to provide that the cheese contains more than 52%, but not more than 58%, of moisture, and not less than 18% of milk fat in the finished product, and that part-skim mozzarella cheese contains more than 52%, but not more than 60%, of moisture, and less than 18%, but not less than 13%, of milk fat in the finished product (Chapter 747, Laws of 1958, N. Y. Agriculture and Markets Law, § 46(33)). The milk fat content under the New York standards is expressed in terms of the entire product whereas the federal standards, as finally adopted, express milk fat content in relation to the solids of the cheese.

It is to be noted that the New York standards of identity are almost identical to those initially proposed to respondent by the National Cheese Institute and differ radically from that organization's second proposal. The National Cheese Institute was invited to and did present

evidence at the New York State Legislative Hearings. (But, cf. Calif. Admin. Code, Title 3, § 415 which sets forth standards similar to the second proposal of the National Cheese Institute. These standards were adopted without petitioners herein receiving notice or being invited to present evidence.)

On November 27, 1957, the respondent announced that objections to the order, denying standards of identity in accordance with the second proposal of the National Cheese Institute, had been filed and that a public hearing to receive evidence on the proposed standards would be announced in the Federal Register (22 F. R. 9731).

Thereafter, on February 15, 1958 (23 F. R. 1012), notice of hearings to establish definitions and standards of identity was published. This notice set forth the second proposals of the National Cheese Institute which had been denied by respondent on September 30, 1957, as noted. The stated reason for the denial of these proposals was that the information received did not support a finding that it would promote honesty and fair dealing in the interest of consumers to adopt the definition and standard of identity for mozzarella, as proposed in the second instance by the National Cheese Institute.

Hearings:

Public hearings were held in May, 1958. The testimony established, and it became part both of respondent's tentative and final orders, that until after World War II, the demand for mozzarella cheese in this country was minimal except among segments of the population of eastern cities having an Italian background. This demand was supplied by several eastern producers. Then there developed throughout the United States a striking growth in popularity of a food item known by the name "pizza", which is the Italian word for pie. Cheese of a soft, bland, "stretching", pastafilata type is an ingredient of pizza,

and so the demand for such a cheese grew as rapidly as the growth of pizza.

Mozzarella cheese, as produced by the eastern manufacturers, in accordance with the method brought from Italy and produced in this country as early as 1900 and earlier, was the cheese called for in the making of pizza.

To fulfill the greatly increased demand for a cheese deemed suitable for making "pizza", cheesemakers in Wisconsin, and some other midwestern states, stepped up the production of another type of cheese and advertised it extensively as suitable for pizza. This cheese for pizza, as made in the midwest, differed from mozzarella cheese in that it was actually more like an uncured provolone cheese. Nevertheless, since recipes and directions for the making of pizza pie generally always called for mozzarella cheese as an ingredient, the midwestern manufacturers of this new, theretofore unproduced cheese, presumed to label their newly produced uncured provolone-type cheese as mozzarella cheese or as pizza cheese, in order to satisfy the demands of the pizza pie market.

At the hearings in 1958, the midwestern producers of the newly produced cheese maintained that their new product—uncured provolone-type cheese—should be designated mozzarella cheese.

Petitioners contended that this new product was not mozzarella cheese; that to call it mozzarella cheese was false and a misbranding; that it was not only misleading but would create consumer confusion and would not promote honesty and fair dealing in the interest of the only really important party in this case, namely, the consumer.

Tentative Order:

Thereafter, on July 17, 1961, the respondent issued proposed findings of fact and a tentative order (26 F. R. 6599) setting forth *inter alia* that the type of cheese which had recently come into existence for use in the manufacture

of "Pizza" or "Pizza Pie" was frequently labelled "For Pizza", or "Pizza Cheese"; that it would promote honesty and fair dealings in the interest of consumers for this type of cheese to be distinctively labelled; and that avoidance of consumer confusion would be best served by establishing a separate standard of identity for this type of cheese under the names of "Pizza Cheese" and "Part-Skim Pizza Cheese."

Final Order:

Three and one-half years later, without the presentation of any further evidence, respondent executed an about-face. Without changing any of his fact-findings, he, nevertheless, completely reversed his conclusion, as set forth in the tentative order of July 17, 1961, and issued an order on December 15, 1964, promulgating standards for "mozzarella cheese" and "part-skim mozzarella cheese" the original eastern product, and substituting, "Low Moisture Mozzarella Cheese" and "Part-Skim Low Moisture Mozzarella Cheese" for his designation of "Pizza Cheese" in 1961. This was in absolute contravention of his tentative order setting forth standards for "Pizza Cheese" which were determined upon, as he had then stated, because "it would avoid confusion and promote honesty and fair dealing in the interest of consumers to make a separate standard for the cheese in question under the name 'Pizza cheese' ". The term low-moisture mozzarella cheese is thus applied to a cheese which respondent specifically finds in his final order to differ "in some respects from eastern-type Mozzarella cheese. It tended to be somewhat more like an uncured provolone cheese."

Judicial Review:

The Court below affirmed respondent's order with the following understatement (356 F. 2d at 876):

> "While there was evidence to indicate that the two cheeses are different in color, taste, texture, and con-

sistency, and it was not disputed that the eastern cheese was of earlier origin, and more closely resembles authentic Italian Mozzarella, there was also evidence that the consuming public identified as Mozzarella the midwestern product . . .

The fact that some midwestern producers labeled their product also as 'pizza cheese' indicates more a recommended use than a name. There was substantial evidence that the consuming public identified the low-moisure product as Mozzarella."

Effect on the Consumer:

Although the very statute, under which the respondent received his authority to act in matters of this nature, requires the "fixing and establishing for any food *under its common or usual name* so far as practicable, a reasonable definition and standard of identity . . ." (Sec. 401, emphasis added), and regulations adopted after the hearing must have the support of substantial evidence, there is not a line of evidence in the entire record which indicates that there ever existed, either in the minds of the consumer, or in the parlance of the trade, a product known as "low-moisture mozzarella cheese". This mongrel cheese, which is concededly neither mozzarella nor provolone, although found by respondent to be more like provolone, is thus held out to the public as mozzarella, a superior product, and naturally a better buy, since it has less moisture. This mislabelled and misbranded invention of the respondent can serve only to compound the deceit and confusion of the public.

REASONS FOR GRANTING THE WRIT

POINT I

There is no evidence of rational probative force to support the conclusion of the respondent.

A nation-wide practice of a lack of "truth-in-packaging" is a matter of current grave concern. It is hard to believe that the Secretary of Health, Education and Welfare of the United States would consciously lend the sanction of his office to such deception. Yet to call an uncured provolone-type cheese a low moisture mozzarella simply because a certain group of influential manufacturers attempted to delude the consuming public into believing it was mozzarella, gradually over a period of less than 8 or 9 years, with the design of taking commercial advantage of a lucrative market, is governmental approval of commercial thievery, a fraud upon the consuming public, and akin to calling a spade a club, simply because they are both cards of the same deck.

The essential grievance here is that there has been such a misbranding of the western cheese as to irresistibly delude the public into believing that the western cheese is basically the same as the eastern cheese but that it is essentially a superior product compared to the eastern cheese. This inevitably follows from the fact that while both are called mozzarella, the western product is branded as having less moisture and consequently the consumer is logically led to believe that he is buying mozzarella cheese with more solid content, and accordingly getting a better buy for his money. But he is simply not buying mozzarella.

The mislabelling of the western product arises from the fact that although it is true that the western hybrid has less moisture, it is not true that it is mozzarella cheese

and one of the many reasons, in addition to a difference in taste, color, texture, aroma and process, that it is not mozzarella lies precisely in the fact that it contains less moisture than mozzarella cheese. The western producers would strenuously object to calling their product "high-fat mozzarella", although it is true that their imposter cheese is of a higher fat content than mozzarella cheese. But even branding the western product as "high-fat mozzarella" would not make it mozzarella, precisely because it is not mozzarella. The Court below recognized this when it said ". . . there was evidence to indicate that the two cheeses are different in color, taste, texture and consistency, and it was not disputed that the eastern cheese was of earlier origin, and more closely resembles authentic Italian Mozzarella . . ." (356 F. 2d at 876).

It is as if the respondent, with the problem of describing butter as contrasted with oleomargarine, were to label butter as butter, and oleo as "Low Milk-Fat Butter". This would be on the theory that butter is made solely of milk fats and oleo is prepared from animal fat or vegetable oil, or a combination of both, and intimately connected with a lesser amount of milk fat. But branding oleo as "Low Milk-Fat Butter", or as butter in any other fashion, would be a false description because oleo is not butter. Yet the weight-conscious public would be deceived into believing that "Low Milk-Fat Butter" is a superior product to a butter containing greater fat.

Only by ingenious resort to far-out semantics has respondent been able to misbrand the western cheese as a spurious type of mozzarella when it is not mozzarella at all, and thereby delude the public into swallowing a species of provolone as a more desirable mozzarella.

Petitioners assert that there is no evidence of substance to justify the abrupt and radical turnabout of the respondent in switching his conclusions, or to support his last-found definitions and standards of identity of the eastern

and western cheeses; that it is self-evident that deception piled upon deception is being perpetrated upon the consuming public.

The evidence relied upon by the Court below does not add up to substantial evidence. The witnesses for the midwestern producers conceded that the cheese which they labelled mozzarella was made by a different process than mozzarella cheese; that it was in fact a new-type low moisture uncured cheese (72b, 74b, 80b, 128b). The Court below was firm in its opinion that the consuming public had come to know the western product as mozzarella, yet the respondent was not so sure, for he said: "To these commercial purchasers this designation ["pizza cheese"] *probably* meant a low-moisture mozzarella-type cheese." (R. 22a; emphasis added.) This was merely respondents' guess without a single consumer called as a witness to support it. The only evidence presented to the Court in support of respondent's conclusion (88a, 90a, 12b, 83b, 123-b-125b) merely indicated that the midwestern producers of the new type cheese initially labelled it scamorza cheese and pizza cheese and later they labelled it mozzarella cheese, in addition to pizza cheese and scamorza, to benefit by the pizza and mozzarella market with the result that the consuming public was at all times unaware of the exact nomenclature of this new product. Yet it is crystal clear that the product was never labelled "low moisture mozzarella", nor did respondent or the Court below so find.

The fact that some midwestern producers called their product mozzarella does not make it so; it is evidence only of the fact that they misappropriated a name used for over 60 years, and applicable only to genuine mozzarella, to a new type and different kind of cheese, just recently produced in any quantity for about the 8 or 9 years between World War II and the institution of these proceedings in 1956. Just as the pizza market grew slowly during this period, the deception and deluding of the consumer gradually increased—an imperceptible but palpable fraud. In-

deed, the respondent himself found that the western product was more of a provolone. He found (No. 9) that:

> "This cheese for pizza as made in the Midwest differed in some respects from eastern-type mozzarella cheese. It tended to be somewhat more like an uncured provolone cheese."

Despite the fact that the western low-moisture, uncured provolone-like cheese is not mozzarella but a different and distinct kind of cheese, the Court below, nonetheless, found that "the order of respondent was based on substantial evidence in the record". It did so on the untenable theory that it was conceivably possible for respondent to find "that the public knew as Mozzarella two different cheeses . . ." and that there "was substantial evidence that the consuming public identified the low-moisture product as Mozzarella." (It is noteworthy that not a single consumer was called as a witness to identify the midwestern product as mozzarella, while at the New York hearings the consumers called as witnesses consistently recognized the eastern product as mozzarella (74a-75a).)

Thus the Court approves a "bootstrap operation". Simply because the midwestern producers spuriously labelled their "provolone-like" cheese, "Mozzarella", over a relatively short period of time, admittedly to take advantage of the demand of the pizza market, and thereby deluded the public, the Court below now lends its judicial sanction to labelling the counterfeit mozzarella a genuine mozzarella, perforce its masquerade, and thus aggravates the initial deceit perpetrated upon the consuming public. This, patently, is not the kind of substantial evidence the law requires to sustain an order of the respondent, nor is it consistent with the current nation-wide demand for "truth-in-packaging". Rulings of this nature make clear the imperative need for a Department of the Consumer, as recently proposed by the President and discussed by the Congress.

POINT II

There now exists a direct conflict between Federal law and New York law with the result that New York citizens are deprived completely of any low-moisture cheese.

By inventing this never-before recognized term "low-moisture mozzarella" the respondent has created a situation whereby that product cannot now be sold nor produced in New York State. Under New York law the low-moisture product cannot bear the name mozzarella, and is labelled "pizza cheese". Such labelling, however, now violates Federal law as Section 403(g) of the Food, Drug, and Cosmetic Act requires that any food that purports to be a food for which a definition and standard of identity has been prescribed must bear the name of the food specified in the definition and standard, if introduced into commerce. Consequently it must now be branded "low-moisture mozzarella" under the order here sought to be reviewed. Under this anomolous situation New York cheese companies can produce neither "pizza cheese" nor "low-moisture mozzarella cheese" without violating either Federal or New York statutes, nor will New York consumers be able to purchase the low-moisture product.

By this action of respondent, the New York producers and all New York consumers of such cheese have been deprived of their substantive right to market and to buy the product designated under either name. Such unreasonable and arbitrary action of the respondent, resulting in such substantial deprivation of the rights of all citizens of New York State should not be countenanced.

The National Cheese Institute was represented at the New York Legislative Hearings and urged that New York adopt a standard of identity consistent with their second proposal herein. The New York Legislature was familiar, however, with the Institute's first proposals, just one year prior, which were consistent with the recognized method

of producing mozzarella, and adopting this method, rejected the newly conceived after-thought proposal. It thus became necessary for the Institute to convince the respondent of the soundness of its new proposals if it was going to accomplish its purpose of extending the name mozzarella from a product that is a fresh, succulent, milky cheese with a bland sweet flavor and stretchy consistency, having an average shelf-life of one month, to a product with an obviously different taste, texture, aroma and color, but with a greater shelf-life. This extension was with the avowed purpose of taking advantage of the pizza market craze, and let the consumer be damned.

Thus, the National Cheese Institute petitioned respondent a second time and, not being successful, filed objections and finally, after respondent had already twice decided that the promulgation of standards of identity of mozzarella was not dictated by the circumstances, the Institute finally prevailed upon respondent to give governmental support to this deceit on the public.

POINT III

The respondent's order was plainly dictated by business pressures in direct contravention of the purposes of the Act.

Unless this Court accepts jurisdiction, and, after due consideration, recognizes that the final conclusion promulgated by respondent is wholly without substantial evidence of rational probative force, the fundamental deception arising from the present definition and standards of identity will be beyond correction. The tens of millions of uninformed consumers in the grocery stores, delicatessens and supermarkets throughout the country, each day, will be lulled into believing that the two different cheeses available to them are both mozzarella, except that one has less moisture content, and is, accordingly, an apparently superior product.

The objection of petitioners is not: that of alternative choices open to respondent, one of them is more reasonable than another. Nor do petitioners urge that judicial judgment be substituted for that of respondent. It is not our position that respondent erroneously chose among possible reasonable alternative standards of identity. Rather, our submission is that his choice of "low moisture mozzarella" is unreasonable as wholly foreign to the product itself, and thus not an alternative, since the name mozzarella has no proper application to the low-moisture product, except perhaps through the determined program of misbranding carried on through a few short years, to seize advantage of the demand of the pizza market. (This determined program of misbranding consisted, *inter alia*, of nation-wide TV programs, the Kraft Hour, and center-fold spreads in national magazines.)

It is our submission that where a fact pattern permits of different reasonable inferences, separate choices, or alternative conclusions, a choice of one to the exclusion of all others is a rational choice. But where a fact pattern permits of only one logical conclusion, that the western provolone-type cheese is *not* mozzarella, the choice of the opposite, opposing, and conflicting conclusion cannot be supported upon any rational basis. Yet that is precisely what the respondent has done in this case. He has taken the name "Mozzarella" and used it to describe an alien product.

Respondent was clearly right in his tentative order of 1961, not so much in calling the new western provolone-type product "pizza cheese", as, in particular, not calling it mozzarella. He was clearly wrong the second time around, in 1964, in calling the provolone-type product mozzarella, no matter how he qualified with adjectives the name of the genuine article.

The entire purpose of the Act, as mandated by the Congress, is to authorize the respondent to promulgate true

definitions and standards of identity under which the integrity of a food product can be effectively maintained. To indulge the deceptive practices of certain "giants" in an industry at the expense of the integrity of a food product—and at the ultimate expense of a deluded consuming public—is not consistent with these stated purposes.

Respondent would have been better advised to adhere to his statutory mandate rather than to assume the unwarranted paternalistic role of peace-maker, as illustrated in the Conclusion in his brief below (pp. 35-6):

> "The Commissioner was faced with the problem of *adjusting* the conflicting claims of eastern and midwestern cheese producers. . . .
>
> "The Commissioner *adjusted* the conflicting claims by *allowing* the eastern product to be designated as 'mozzarella', since it had been so known for a longer period of time, and the midwestern type of cheese to be designated as 'low moisture mozzarella'." (emphasis added)

This, the respondent propounded as "a reasonable solution of the problem" (p. 36).

There is no provision in the statute for respondent to arrogate unto himself the role of compromiser or adjuster, even though one of the parties to the compromise occupies a position of great prominence in American Industry. His function was not the *allowance* of a designation, the settlement of a controversy; his only function was to set forth true standards of identity which would effectively maintain the integrity of the product. Through respondent's openly admitted volunteer peace-maker and compromising-adjuster role, he deliberately abandoned the single statutory objective of maintaining the integrity of this food product. Neither submission to insistent pressure, nor the placation of the stronger side to a controversy, has any place in such a statutory determination. Respondent should be the first

to concede that compromise and adjustment, ostensibly to appease conflicting parties, is not conducive to "truth-in-packaging" for the benefit of the consuming public. There is no warrant for compromising with truth. The role respondent admittedly assumed here has no sanction in law.

POINT IV

The conclusion of the respondent is directly contradictory in principle to his conclusion in *Columbia Cheese Co.* v. *McNutt.*

In *Columbia Cheese Co.* v. *McNutt,* 137 F. 2d 576 (2nd Cir. 1943), cert. den. 321 U. S. 777, 64 S. Ct. 618 (printed in Appendix C, *infra,* page 47), the result was precisely the reverse of that in the instant matter. There it was shown that not only was genuine cream cheese distributed to consumers as "cream cheese" but another type cheese which, as here, differed in milk fat content and moisture from the genuine article was also marketed as "cream cheese". (See Finding of Fact No. 34, Cream Cheese Standard, 7 F. R. 10756.) At the hearing, witnesses testifying for the same interests represented here by the National Cheese Institute (one key witness voicing contradictory opinions at each hearing), urged that consumers would be misled if the cheaper product continued to be labelled as cream cheese and recommended the name "Neufchatel" as an appropriate name. The respondent went along with the proponents, finding that it would not promote honesty and fair dealing in the interests of consumers to establish a definition and standard of identity for the imitation product under the name "cream cheese" or a name which includes the words "cream cheese", and Neufchatel was selected. Although his conclusions in both cases are irreconcilable, the respondent, nevertheless, has now been upheld in both cases by the same Circuit Court of Appeals on the same theory that substantial evidence in each case warranted the obviously conflicting results.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

STATUTES

Federal Food, Drug & Cosmetic Act, sections 401, 403 and 701.

"§ 341. [section 401 of the Act]. Definitions and standards for food

Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container * * *"

"§ 343. [section 403 of the Act]. Misbranded food

A food shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.

Offer for sale under another name

(b) If it is offered for sale under the name of another food.

Imitation of another food

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated.

Misleading container

(d) If its container is so made, formed, or filled as to be misleading.

Package form

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

Prominence of information on label

(f) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

Representation as to definition and standard of identity

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

Appendix A

Representation as to standards of quality and fill of container

(h) If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341 of this title, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; * * *"

"§ 371. [section 701 of the Act]. Regulations and hearings—Authority to promulgate regulations

(a) The authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is vested in the Secretary.

* * *

Conduct of hearings

(c) Hearings authorized or required by this chapter shall be conducted by the Secretary of Health, Education, and Welfare or such officer or employee as he may designate for the purpose.

* * *

Procedure for establishment

(e) (1) Any action for the issuance, amendment, or repeal of any regulation under section 341, 343(j), 344(a), 346, 351(b), or 352(d) or (h), of this title shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity

to present their views thereon, orally or in writing. As soon as practicable thereafter, the Secretary shall by order act upon such proposal and shall make such order public. Except as provided in paragraph (2) of this subsection, the order shall become effective at such time as may be specified therein, but not prior to the day following the last day on which objections may be filed under such paragraph.

(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) of this subsection is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Until final action upon such objections is taken by the Secretary under paragraph (3) of this subsection, the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made. As soon as practicable after the time for filing objections has expired the Secretary shall publish a notice in the Federal Register specifying those parts of the order which have been stayed by the filing of objections and, if no objections have been filed, stating that fact.

(3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections

and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based. The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

Review of order

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeal for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken

before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law."

Appendix B.

Opinions and Judgment Below (356 F. 2d 874).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 131—September Term, 1965.

(Argued January 4, 1966 Decided February 4, 1966.)

Docket No. 29567

BRUNETTO CHEESE MANUFACTURING CORP., C. & F. CHEESE DISTRIBUTORS, INC., FALCONE DAIRY PRODUCTS, INC., J. J. GIAMMALVO, INC., M. MAGGIO CO., POLLIO DAIRY PRODUCTS CORP., SORRENTO CHEESE COMPANY, INC., SUNBURY CHEESE COMPANY, INC., and ITALIAN FRESH CHEESE MANUFACTURERS ASSOCIATION, INC.,

Petitioners,

—v.—

ANTHONY J. CELEBREZZE, Secretary of Health, Education, and Welfare of the United States,

Respondent.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Petition for review of an order of the Secretary of Health, Education, and Welfare promulgated under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §341 (52 Stat. 1046, as amended; 70 Stat. 919) defining and setting standards of identity for Mozzarella cheese, Scamorza cheese, Part-skim Mozzarella cheese and Part-skim Scamorza cheese. Order affirmed.

Appendix B.

MARTIN A. FROMER, New York, N. Y., *for petitioners.*

ROBERT E. KUSHNER, Asst. United States Attorney for the Southern District of New York (Robert M. Morgenthau, United States Attorney for the Southern District of New York, William W. Goodrich, Asst. General Counsel for Food and Drugs, Joanne S. Sisk, Attorney, U. S. Dept. of Health, Education and Welfare, on the brief), *for respondent.*

PER CURIAM:

Petitioners, fresh cheese manufacturers of the northeastern United States, and their trade association, seek review of an order of the Secretary of Health, Education, and Welfare under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. §341, promulgating definitions and standards of identity for Mozzarella, Scamorza, Part-skim Mozzarella and Part-skim Scamorza cheese. We find the order based on substantial evidence in the record and affirm the order.

The regulations establish standards of identity for the Mozzarella cheese manufactured by petitioners, and for a cheese manufactured by midwestern producers, which is also sold as Mozzarella, but which has a lower moisture content.

After a hearing on standards proposed by the National Cheese Institute, representing midwestern producers, the Commissioner issued tentative findings establishing two basic standards of identity, and using "mozzarella" as the name for petitioners' product, manufactured in the east, and "pizza cheese" for the low moisture product. The midwestern producers protested, on the grounds that the

consuming public, which had previously purchased this product as Mozzarella, would be confused, that there were other uses for this cheese than for pizza, that other cheeses were used for pizza, and that recipes in general circulation called for mozzarella cheese. The Commissioner altered the findings to adopt "Low-Moisture Mozzarella" as the name for the midwestern product.

Petitioners attack the choice of this name. The findings must be supported by substantial evidence, §403(f)(3) of the Act, 21 U. S. C. §371(f)(3); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218 (1943). The court cannot substitute its judgment for that of the administrative agency if the findings are so supported. Under §401 of the Act, 21 U. S. C. §341, the Secretary is to promulgate regulations establishing a reasonable definition and standard of identity for a product, under the product's common or usual name so far as is practicable, "whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers."

While there was evidence to indicate that the two cheeses are different in color, taste, texture, and consistency, and it was not disputed that the eastern cheese was of earlier origin, and more closely resembles authentic Italian Mozzarella, there was also evidence that the consuming public identified as Mozzarella the midwestern product. Most of the midwestern producers included the name mozzarella in their labels. There was testimony that the midwestern cheese was marketed throughout the country and known as Mozzarella, and that due to its high moisture content and resultant perishability the eastern cheese was not marketed to any great extent outside the east. Yet the consuming public was not confined to the east.

Thus the Commissioner could find that the public knew as Mozzarella two different cheeses, and that there was a need for separate standards of identity. Accordingly he

preserved the name Mozzarella for each, but added the description "low-moisture" to the midwestern product. The Act requires that the product when given standards be known by its "common or usual name so far as practicable." Thus the ultimate question is whether there was substantial evidence on the record to support the name chosen. Petitioners do not appear to disagree that common or usual name means that name by which the product is known to the community at large. *United States* v. *Crescent-Kelvan Co.*, 164 F. 2d 582 (3 Cir. 1948) (construing similar language in §502(e) of the Act, 21 U. S. C. §352(e)).

The fact that some midwestern producers labeled their product also as "pizza cheese" indicates more a recommended use than a name. There was substantial evidence that the consuming public identified the low-moisture product as Mozzarella. And as long as the name chosen is appropriate, it is no argument that the Commissioner rejected another name which is also appropriate. *Columbia Cheese Co.* v. *McNutt*, 137 F. 2d 576 (2 Cir. 1943). We cannot substitute our judgment for his. Since his finding is supported by substantial evidence the order is affirmed.

Order to Be Reviewed, Dated December 15, 1964.

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER B—FOOD AND FOOD PRODUCTS

PART 19—CHEESES, PROCESSED CHEESES, CHEESE FOODS, CHEESE SPREADS, AND RELATED FOODS

Order Promulgating Definitions and Standards of Identity for Mozzarella Cheese, Scamorza Cheese; Part-Skim Mozzarella Cheese, Part-Skim Scamorza cheese

Appendix B.

In the matter of establishing definitions and standards of identity for mozzarella cheese, scamorza cheese; part-skim mozzarella cheese, part-skim scamorza cheese:

Notice of the filing of a petition setting forth proposed definitions and standards of identity for mozzarella cheese, scamorza cheese, part-skim mozzarella cheese, part-skim scamorza cheese was published in the Federal Register of January 23, 1957 (22 F. R. 428). By order published in the Federal Register of October 4, 1957 (22 F. R. 7906) the proposals were rejected. To this order objections were filed and a hearing was scheduled to take evidence on the proposals (22 F. R. 9731; 23 F. R. 1012, 1796).

Findings of fact and a tentative order in this matter were published July 22, 1961 (26 F. R. 6599). On the basis of the evidence received at the hearing, and pursuant to the authority vested in the Secretary of Health, Education, and Welfare by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 5 Stat. 1046, 1055 as amended; 70 Stat. 919; 21 U. S. C. 341, 371) and delegated by the Secretary to the Commissioner of Food and Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055 of written arguments, suggested findings, and exceptions to the tentative order, which are adopted in part and rejected in part and is apparent from the detailed findings herein made, the following order is issued:

Findings of fact.[1] 1. Many years ago there originated in Italy, a soft, uncured, moist, light-colored, bland, milky cheese of the pasta-filata type which acquired the name "mozzarella." Originally this cheese was made from the milk of water buffaloes. In more recent years cow's milk was used either in whole or in part. The curd was

[1] The citations following each finding of fact refer to the pages of the transcript of testimony and the exhibits received in evidence at the hearing.

stretched in hot water and formed into various shapes, generally somewhat rounded. One shape acquired the name "scamorza," but with the passage of time the name "scamorza" came to be used alternatively with the name "mozzarella." Mozzarella cheese has continued to be made in Italy. An excerpt from the Italian book "Legislation on Foods, Farm Products and Products for Farm Uses, 6th Edition, March 1958" shows mozzarella and scamorza under the general category of "pasta filata cheese from cow's milk," and this reference shows that such cheese is required to have a minimum butterfat on the dry basis of 45 percent. An excerpt from another Italian book "Food Products—Analysis—Legislation" describes pastafilata type (drawn curd) cheeses currently made in Italy and lists mozzarella and scamorza. The fat content for mozzarella is prescribed as: "Minimum in dry matter 45%."

(R. 16-19, 57, 132-133, 173, 301, 488, 516-517, 608, 862, 866, 882-884, 1057, 1317; Ex. 9, 38, 39)

2. Italian immigrants coming to the United States and settling in eastern cities, particularly New York, accounted for the development of a demand in this country for mozzarella cheese. Since mozzarella is a high-moisture, soft, uncured cheese it was not practical to import it from the old country. As early as 1900 and earlier, cheesemakers among the Italian immigrants began producing mozzarella cheese in this country. Here they used cow's milk, and they followed in general procedures that had been developed in Italy. In many instances these procedures were handed down from father to son. In more recent years there have been some developments that represent deviations from the older practices. One of these developments is a greater mechanization in the factories. Another development is pasteurization of the milk to comply with re-

quirements of state and local laws. Also, the practice of using partly skimmed milk has developed, so that some producers distribute two or three so-called grades of mozzarella, depending on whether the starting mix consists of whole milk, or part-skim milk. These cheesemakers located in New York State and some other Eastern States were represented at the hearings by the Italian Fresh Cheese Manufacturers Association, and their products were sometimes characterized as "eastern type."

(R. 142, 157, 174, 402, 403, 488, 713, 753-755, 801-803, 860-866, 888, 889, 1059, 1099, 1135, 1162, 1199, 1236, 1237, 1274; Ex. 9)

3. The steps in making mozzarella cheese from whole milk, as this cheese is made in the Eastern States, are as follows:

Whole milk which in many instances is not adjusted to any particular fat content but which in some cases is adjusted by separating part of the fat or by adding skim milk or cream, is pasteurized. At a temperature of approximately 88°F. it is inoculated with a relatively small amount of starter, a culture of harmless lactic-acid-producing bacteria. It may be slightly acidified with vinegar. A small amount of liquid rennet may be added. After the curd forms, it is cut and then stirred to aid in separating the whey. The whey is drained, and cold water may be added and then drained off. The curd is collected and as drainage progresses the curd ripens further, the rate depending in part upon the temperature. The temperature may be controlled by using ice or holding the curd under refrigeration. The curd may be cut. It is warmed in hot water or steam and is kneaded and stretched and then molded into the desired shape. The units are firmed by immersion in cold water and may be brined and drained. (R. 9, 699-702, 713-715, 746, 767, 1067, 1081, 1148-1161, 1237, 1238, 1270, 1314, 1344; Ex. 6-9, 30)

4. The mozzarella cheese made in the Eastern States is relatively high in moisture content. As a cheese that is used to some extent for table use, the high moisture content is one of its important characteristics. The moisture falls in the range of from 52 percent up to as high as 60 percent. The milk fat content varies with the fat of the starting mix. In most natural cheeses made from whole milk, the solids of the cheese contain not less than 50 percent fat. However, where cheeses are kneaded and stretched in hot water there is some loss of fat, and for such cheeses it is reasonable to require that the finished food shall have not less than 45 percent of milk fat, calculated on the solids basis. The standard for provolone cheese, which is also a stretched-curd cheese made from cow's milk, requires not less than 45 percent of milk fat on the solids basis. The method for determining the moisture and the fat content of cheese, as set out in the definition and standard of identity for cheddar cheese (21 CFR 19.500), is applicable to mozzarella cheese.

(R. 126, 167, 177-178, 211-212, 226, 308-309, 436-443, 458, 720, 755, 781, 796, 865, 904, 1148-1149, 1245, 1253, 1294, 1299, 1308, 1350; 21 CFR 19.500, 19.590; Ex. 7, 9, 10, 31, 32, 38, 39)

5. In rare instances the fat content of cheese is expressed on an "as is" basis, that is, on the basis of the entire weight of the cheese including its moisture. However, cheese standards generally prescribe the minimum fat content on the "dry" basis, that is, as the percent of fat in the solids of the cheese. The "dry" basis has the advantage that prescribing the minimum fat in the solids of the mozzarella cheese at the value which results from using whole milk starting mix (see finding 4) differentiates mozzarella cheese from cheese made from part-skim milk. Witnesses for the Italian Fresh Cheese Manufacturers As-

sociation recommended that the mozzarella cheese standard should prescribe the minimum milk fat requirement on an "as is" basis at 18 percent. To follow the recommendation of these witnesses would have the disadvantage of permitting cheese made by the procedure set out in finding 3, and having a moisture content of 52 percent or slightly more, to be made from part-skim milk but to be labeled "mozzarella cheese" rather than "part-skim mozzarella cheese" (see finding 6). When the moisture content of a cheese is known, the fat content can be converted from the "as is" basis to the "dry" basis by a simple calculation. For example, if a mozzarella cheese with 60 percent moisture contains 18 percent fat on the "as is" basis it contains 18 parts of fat in 40 parts of solids and this amounts to 45 percent fat on the "dry" basis.

(R. 18, 22-24, 50-51, 165-167, 191-192, 197-198, 211-217, 226, 257-258, 306-311, 354, 754, 893-895, 914, 1050, 1058, 1114, 1239, 1245-1246, 1252-1253, 1280, 1294, 1299, 1308; Ex. 10, 30, 31, 38, 39)

6. In addition to the mozzarella made from whole milk, either with or without adjustment, cheesemakers have developed a mozzarella made by the same procedure but using part-skim milk as the starting mix. Generally, the fat content of the starting mix is reduced to about 2 percent, which is substantially lower than the fat content of whole milk. Representatives of eastern manufacturers reported that the content of milk fat in the whole milk they use runs 3.3 percent or higher. The proportion of milk fat to nonfat solids in a starting mix testing 2 percent fat is such that the part-skim mix yields a mozzarella having a fat content of 30 percent or higher on the "dry" basis. The product made in the Eastern States from part-skim milk is similar in its high mositure content to the mozzarella made from whole milk; that is,

the moisture ranges between 52 and 60 percent. It is reasonable for the standard, in specifying the name for the article made from part-skim milk, to prescribe that the words "part-skim" be included in the name.

(R. 22, 50, 126, 152, 164, 295, 310, 613, 676-677, 753-755, 792, 801, 816, 883, 1067, 1114-1115, 1148-1149, 1181, 1201, 1245, 1294, 1299, 1311, 1349, 1351, 1369; Ex. 9, 31)

7. It is in the interest of consumers to require that the milk or the part-skim milk used be pasteurized for the purpose of destroying pathogenic micro-organisms. Testimony by a public health expert showed that some pathogens survive when milk is held for 30 minutes at 143° F. but are destroyed with the same holding period if the temperature is maintained at not less than 145° F. Most plants use so-called flash pasteurizers in which the milk is heated for a much shorter time but at a temperature sufficiently higher to be equally effective in destroying micro-organisms. An appropriate test for pasteurization is the phosphatase destruction test (provolone modification) as set out in detail in the standard for cheddar cheese (21 CFR 19.500), and it is reasonable to prescribe that the finished cheese shall be deemed not to have been made from pasteurized milk when this test shows for 0.25 gram of the cheese a phenol equivalent of more than 3 micrograms.

(R. 26, 42, 47-48, 157, 364, 392, 407, 416-417, 468-476, 519, 531, 538, 760-761, 809, 889, 1149, 1244, 1354. 21 CFR 19.500; Ex. 11)

8. Until after World War II, the demand for mozzarella cheese in this country was not great except among segments of the population of eastern cities having an Italian background. This demand was supplied by the eastern producers. Then there developed throughout the

country a striking growth in popularity of a food item known by the name "pizza," which is the Italian word for pie. Cheese of a soft, bland, "stretching", pastafilata type is a preferred cheese ingredient for pizza, and so the demand for such cheese grew with the growth in popularity of pizza. To supply this geographically widened and substantially increased demand, cheesemakers in Wisconsin and some other Mid-western States rapidly built up their production of cheese suitable for making pizza.

(R. 20-21, 56-57, 100-101, 132, 215, 221, 295, 354, 489, 500-501, 517-518, 521-522, 806, 822, 847, 876, 1163, 1317; Ex. 18, 33-36)

9. This cheese for pizza as made in the Midwest differed in some respects from eastern-type mozzarella cheese. It tended to be somewhat more like an uncured provolone cheese. Its moisture content was intermediate between the lower range for mozzarella, as that cheese had been made for many years in New York State, and the maximum of 45 percent permitted by the Standard for provolone cheese. In the standards advocated by midwestern producers, several of the provisions to which objections were taken by eastern producers corresponded to provisions in the standard for provolone cheese. Among these were the provision for reheating, after cutting the curd, to reduce the moisture content of the cheese; the provision permitting use of 0.02 percent of calcium chloride and rennet paste or extract of rennet paste; the provision permitting reconstituted skim milk to be used in adjusting the starting mix; and the provision that has been called the "alternative make" provision, which permits other procedures to be used, provided the finished cheese has the same typical and chemical properties that it would have if the procedures recited

in the standard are followed. The provision for optional use of unspecified enzyme preparations for curing and developing flavor, as permitted by the provolone standard, is not an appropriate provision for inclusion in a standard for cheese for pizza because cheese for that usage is expected to be bland and not highly flavored. The proposals sponsored by midwestern producers provided for two products, a whole-milk cheese and a part-skim milk cheese, the former to have not less than 45 percent fat on the "dry" basis and the latter to be lower in fat but to have not less than 30 percent fat on the "dry" basis. Finding 7 concerning pasteurization is applicable to both products.

(R. 15, 22-23, 27, 40-50, 54-55, 80-83, 132-133, 248, 264-266, 313, 365, 367, 436-443, 490, 523, 535, 544, 563, 581, 612-613 897, 1148-1158, 1246, 1249-1250, 1280, 1323, 1365; Ex. 4, 10)

10. Cheese made by the procedure recited in finding 3 has been designated by the name "mozzarella cheese" (or "scamorza cheese") throughout the years it has been sold in this country. A significant characteristic of this cheese is its high moisture content which has been observable by purchasers when they bought it at neighborhood cheese shops and when they used it as a table cheese.

The cheese referred to in finding 8, when first made by a midwestern producer of Italian-type cheese, was designated as "scamorza"; however, when this cheese was produced in much greater volume to meet the demand resulting from the postwar popularity of pizza, it was generally represented to be and labeled as "mozzarella". Labels used on the small units for retail sale often showed that this cheese was for use in making pizzas. In some cases, especially in the New York area, large loaves (5

pounds or larger) where sold to commercial pizza producers as "pizza cheese." To these commercial purchasers this designation probably meant a low-moisture, mozzarella-type cheese.

The difference between the type of cheese made in the East for many years and the type more recently developed in the Midwest are such as to call for distinctive labeling in order to promote honesty and fair dealing in the interest of consumers. Witnesses at the hearing suggested various names to distinguish between the two types. Some proposed that the eastern type should be designated "Italian style mozzarella" or "High moisture mozzarella." Others proposed that the midwestern type should be designated "American style mozzarella" or "low moisture mozzarella." The terms "Italian style" and "American style" give no indication that, as between the two types, the difference in moisture content is significant. The terms "high moisture" and "low moisture" are forthright and meaningful. The promotion of the interest of consumers does not require that both designations, "high moisture" for one type and "low moisture" for the other type, be prescribed. As between the two types the name "mozzarella" has been used much longer for the eastern cheese and, accordingly, it is logical for it to continue to be so designated and for the midwestern type to be designated "low moisture mozzarella cheese."

(R. 15, 16, 58, 84, 92-94, 102, 118, 122, 132, 196, 206-209, 217, 232, 272, 297-298, 313, 346, 354-355, 369, 376, 478, 484, 521, 664, 814, 844, 847-848, 854, 874, 878, 1021, 1142, 1144, 1178, 1180, 1199, 1205, 1242, 1252, 1324, 1335, 1365; Ex. 23, 26-28)

Conclusions. On the basis of the foregoing findings of fact, and taking into consideration the substantial evi-

dence of the entire record, it is concluded that it will promote honesty and fair dealing in the interest of consumers to establish definitions and standards of identity as follows:

§ 19.600 Mozzarella cheese, scamorza cheese; identity.

(a) Mozzarella cheese, scamorza cheese is the food prepared from milk and other ingredients specified in this section, by the procedure set forth in paragraph (b) of this section. It may be molded into various shapes. It contains more than 52 percent but not more than 60 perment of moisture, and its milk fat content, calculated on the solids basis, is not less than 45 percent, as determined by the methods prescribed in § 19.500(c).

(b) Milk, which is pasteurized, is warmed to approximately 88° F. and subjected to the action of harmless lactic-acid-producing bacteria, which may be added thereto as starter. The milk may be acidified with vinegar. Liquid rennet may be added to aid in setting the milk to a semisolid mass. The mass is cut, and it may be stirred to facilitate separation of whey from the curd. The whey is drained and the curd may be washed with cold water and the water drained off. The curd may be collected in bundles for further drainage and for ripening. The curd may be iced, it may be held under refrigeration, and it may be permitted to warm to room temperature and ripen further. The curd may be cut. It is immersed in hot water or heated with steam and is kneaded and stretched until smooth and free of lumps. Then it is cut and molded. The molded curd is firmed by immersion in cold water and may be salted in brine and drained.

(c) For the purposes of this section:

(1) The word "milk" means cow's milk, which may be adjusted by separating part of the fat therefrom or by adding cream or skim milk or both.

(2) Milk shall be deemed to have been pasteurized if it has been held at a temperature of not less than 145° F. for a period of not less than 30 minutes, or for a time and temperature equivalent thereto in phosphatase destruction. The finished food shall be deemed not to have been made from pasteurized milk if 0.25 gram shows a phenol equivalent of more than 3 micrograms when tested by the method prescribed in § 19.500(f), provolone modification.

§ 19.601 Part-skim mozzarella cheese, part-skim scamorza cheese; identity.

Part-skim mozzarella cheese, part-skim scamorza cheese conforms to the definition and standard of identity as prescribed for mozzarella cheese by § 19.600, except that its milk fat content, calculated on the solids basis, is less than 45 percent but not less than 30 percent.

§ 19.605 Low moisture mozzarella cheese, low moisture scamorza cheese; identity.

(a) Low moisture mozzarella cheese is the food prepared from milk and other ingredients specified in this section, by the procedure set forth in paragraph (b) of this section, or by another procedure which produces a finished cheese having the same physical and chemical properties as the cheese produced when the procedure set forth in paragarph (b) of this section is used. It may be molded into various shapes. Its moisture content is more than 45 percent but not more than 52 percent, and its milk fat content, calculated on the solids basis, is not less than 45 percent, as determined by the method prescribed in § 19.500(c).

(b) Milk, which is pasteurized, and which may be clarified or homogenized or both, and which may be warmed, is subjected to the action of harmless lactic-acid-producing bacteria, which may be added thereto as starter. The milk may be acidified with vinegar. Rennet, rennet paste, or

extract of rennet paste (with or without purified calcium chloride in a quantity not more than 0.2 percent, calculated as anhydrous calcium chloride, of the weight of the milk) is added to aid in setting the milk to a semisolid mass. The mass is cut, stirred, and allowed to stand. It may be reheated and again stirred. The whey is drained, and the curd may be cut and piled to promote further separation of whey. It may be washed with cold water and the water drained off. The curd may be collected in bundles for further drainage and ripening. The curd may be iced, it may be held under refrigeration, and it may be permitted to warm to room temperature and ripen further. The curd may be cut. It is immersed in hot water or heater with steam and is kneaded and stretched until smooth and free of lumps. Then it is cut and molded. In molding, the curd is kept sufficiently warm to cause proper sealing of the surface. The molded curd is firmed by immersion in cold water and may be salted in brine and drained.

(c) For the purposes of this section:

(1) The word "milk" means cow's milk, which may be adjusted by separating part of the fat therefrom or by adding thereto one or more of the following: Cream, skim milk, concentrated skim milk, nonfat dry milk, and water in a quantity sufficient to reconstitute any concentrated skim milk or nonfat dry milk used.

(2) Milk shall be deemed to have been pasteurized if it has been held at a temperature of not less than 145° F. for a period of 30 minutes or for a time and temperature equivalent thereto in phosphatase destruction. The finished food shall be deemed not to have been made from pasteurized milk if 0.25 gram shows a phenol equivalent of more than 3 micrograms when tested by the method prescribed in § 19.500(f), provolone modification.

§ 19.606 Low moisture part-skim mozzarella cheese, low moisture part-skim scamorza cheese; identity.

Appendix B.

Low moisture part-skim mozzarella cheese conforms to the definition and standard of identity as prescribed for low moisture mozzarella cheese by § 19.605, except that its milk fat content, calculated on the solids basis, is less than 45 percent but not less than 30 percent.

Effective date. This order shall become effective 120 days from the date of its publication in the Federal Register.

Secs. 401, 701; 52 Stat. 1046, 1055 as amended 70 Stat. 919; 21 U. S. C. 341, 371)

Dated: December 15, 1964.

JOHN L. HARVEY,
Deputy Commissioner of Food and Drugs.

[F. R. Doc. 64-12996; Filed, Dec. 21, 1964; 8:45 a. m.]

Excerpts From Proposed Findings of Fact and Order of Respondent Dated July 17, 1961.

10. The cheese produced in the Midwest to supply the demand occasioned by the wide popularity of pizza was often labeled "Mozzarella" or "Scamorza." Frequently, the labels showed that the product was for use in making pizza. Some labels conspicuously stated "cheese for pizza", "for pizza," or "pizza cheese." The differences between the products as made in the East and in the Midwest are such that it will promote honesty and fair dealing in the interest of consumers for them to be distinctively labeled. Various names were suggested such as "high-moisture mozzarella" or "Italian-style mozzarella" for the eastern type cheese and "low-moisture mozzarella" or "American-style mozzarella" for the midwestern type. Avoidance of consumer confusion will be best served by

establishing separate standards and prescribing distinctive names as follows:

"Mozzarella cheese" or alternatively "scamorza cheese" for the eastern-type product made from whole milk.

"Part-skim mozzarella cheese" or alternatively "part-skim scamorza cheese" for the eastern-type product made from part-skim milk.

"Pizza cheese" for the midwestern type product made from whole milk.

"Part-skim pizza cheese" for the midwestern type product made from part-skim milk.

(R. 58, 84, 92-94, 102, 118, 122, 132, 196, 206-209, 217, 232, 272, 297-298, 313, 315, 346, 354-355, 369, 376, 478, 484, 521, 664, 814, 844, 847-848, 854, 874, 878, 1021, 1142, 1144, 1178, 1180, 1199, 1205, 1242, 1252, 1324, 1335, 1365; Ex. 23, 26-28)

Conclusions. On the basis of the foregoing findings of fact; and taking into consideration the substantial evidence of the entire record, it is concluded that it will promote honesty and fair dealing in the interest of consumers to establish definitions and standards of identity as follows:

§ 19.600 Mozzarella cheese, scamorza cheese; identity.

(a) Mozzarella cheese, scamorza cheese, is the food prepared from milk and other ingredients specified in this section, by the procedure set forth in paragraph (b) of this section. It may be molded into various shapes. It contains more than 52 percent but not more than 60 percent of moisture, and its milk fat content, calculated on the solids basis, is not less than 45 percent, as determined by the methods prescribed in § 19.500 (c).

b) Milk, which is pasteurized, is warmed to approximately 88° F. and subjected to the action of harmless lactic-acid-producing bacteria, which may be added thereto as starter. The milk may be acidified with vinegar. Liquid rennet may be added to aid in setting the milk to a semi-solid mass. The mass is cut, and it may be stirred to facilitate separation of whey from the curd. The whey is drained and the curd may be washed with cold water and the water drained off. The curd may be collected in bundles for further drainage and for ripening. The curd may be iced, it may be held under refrigeration, and it may be permitted to warm to room temperature and ripen further. The curd may be cut. It is immersed in hot water or heated with steam and is kneaded and stretched until smooth and free of lumps. Then it is cut and molded. The molded curd is firmed by immersion in cold water and may be salted in brine and drained.

(c) For the purposes of this section:

(1) The word "milk" means cow's milk, which may be adjusted by separating part of the fat therefrom or by adding cream or skim milk or both.

(2) Milk shall be deemed to have been pasteurized if it has been held at a temperature of not less than 145° F. for a period of not less than 30 minutes, or for a time and temperature equivalent thereto in phosphatase destruction. The finished food shall be deemed not to have been made from pasteurized milk if 0.25 gram shows a phenol equivalent of more than 3 micrograms when tested by the method prescribed in § 19.500(f), provolone modification.

§ 19.601 Part-skim mozzarella cheese, part-skim scamorza cheese; identity.

Part-skim mozzarella cheese, part-skim scamorza cheese, conforms to the definition and standards of identity prescribed for mozzarella cheese by § 19.600, except that in its production part-skim milk is used and its milk fat content, calculated on the solids basis, is less than 45 percent but not less than 30 percent.

§ 19.605 Pizza cheese; identity.

(a) Pizza cheese is the food prepared from milk and other ingredients specified in this section, by the procedure set forth in paragraph (b) of this section, or by another procedure which produces a finished cheese having the same physical and chemical properties as the cheese produced when the procedure set forth in paragraph (b) of this section is used. It may be molded into various shapes. Its moisture content is more than 45 percent but not more than 52 percent, and its milk fat content, calculated on the solids basis, is not less than 45 percent, as determined by the methods prescribed in § 19.500 (c).

(b) Milk, which is pasteurized, which may be clarified or homogenized or both, and which may be warmed, is subjected to the action of harmless lactic-acid-producing bacteria, which may be added thereto as starter. The milk may be acidified with vinegar. Rennet, rennet paste, or extract of rennet paste (with or without purified calcium chloride in a quantity not more than 0.02 percent, calculated as anhydrous calcium chloride, of the weight of the milk) is added to aid in setting the milk to a semisolid mass. The mass is cut, stirred, and allowed to stand. It may be reheated and again stirred. The whey is drained, and the curd may be cut and piled to promote further separation of whey. It may be washed with cold water and the water drained off. The curd may be collected in

bundles for further drainage and ripening. The curd may be iced, it may be held under refrigeration, and it may be permitted to warm to room temperature and ripen further. The curd may be cut. It is immersed in hot water or heated with steam and is kneaded and stretched until smooth and free of lumps. Then it is cut and molded. In molding, the curd is kept sufficiently warm to cause proper sealing of the surface. The molded curd is firmed by immersion in cold water and may be salted in brine and drained.

(c) For the purposes of this section:

(1) The word "milk" means cow's milk, which may be adjusted by separating part of the fat therefrom or by adding thereto one or more of the following: Cream, skim milk, concentrated skim milk, nonfat dry milk, and water in a quantity sufficient to reconstitute any concentrated skim milk or nonfat dry milk used.

(2) Milk shall be deemed to have been pasteurized if it has been held at a temperature of not less than 145° F. for a period of 30 minutes, or for a time and temperature equivalent thereto in phosphatase destruction. The finished food shall be deemed not to have been made from pasteurized milk if 0.25 gram shows a phenol equivalent of more than 3 micrograms when tested by the method prescribed in § 19.500(f), provolone modification.

§ 19.606 Part-skim pizza cheese; identity.

Part-skim pizza cheese conforms to the definition and standard of identity as prescribed for pizza cheese by § 19.605, except that in its production part-skim milk is used and its milk fat content, calculated on the solids basis, is less than 45 percent but not less than 30 percent.

Any interested person whose appearance was filed at the hearing may, within 30 days from the date of publica-

tion of this tentative order in the Federal Register, file with the Hearing Clerk, Department of Health, Education, and Welfare, Room 5440, 330 Independence Avenue, SW., Washington 25, D. C., written exceptions thereto. Exceptions shall point out with particularity the alleged errors in the findings of fact and proposed order, and shall contain specific references to the pages of the transcript of testimony or to the exhibits on which the exceptions are based. Exceptions may be accompanied by briefs in support thereof. Exceptions and accompanying briefs should be submitted in quintuplicate.

Dated: July 17, 1961.

JOHN L. HARVEY,
Deputy Commissioner of Food
and Drugs.

Appendix C.

Opinion Conflicting in Principle.

COLUMBIA CHEESE Co. et al. v. McNUTT, Federal Security Adm'r.

No. 239.

Circuit Court of Appeals, Second Circuit.

Aug. 20, 1943.

Proceeding on the petition of Columbia Cheese Company and others against Paul McNutt, as Federal Security Administrator of the United States, to review an order of the acting Federal Security Administrator made by authority of section 401 of the Federal Food and Drug Cosmetic Act, 21 U.S.C.A. § 341, which fixed definitions and standards of identity for cream cheese, neufchatel cheese, cottage cheese, and creamed cottage cheese.

Order affirmed.

Martin A. Fromer, of New York City (Martin A. Fromer and Leo Pfeffer, both of New York City, of counsel), for petitioners.

Wendell Berge, Asst. Atty. Gen., and Oscar A. Provost and Edward G. Jennings, Sp. Assts. to Atty. Gen. (Edward B. Williams, Atty., Federal Security Agency, of Washington, D. C., of counsel), for respondent.

Before SWAN, CHASE, and CLARK, Circuit Judges.

CHASE, Circuit Judge.

The petitioners are cheese manufacturers who allege that they are adversely affected by the order and regulations which will be discussed later in greater detail and they brought this proceeding for judicial review in accordance with § 701(f) of the Act, 21 U.S.C.A. § 371(f), which provides for such a review in cases of actual controversy.

Appendix C.

The administrative proceedings which led to the issuance of the order here under review began in August of 1939 with the object of establishing a definition and standard of identity for cream cheese; and these resulted in a proposed order which was issued on September 28, 1940, with findings of fact and a proposed regulation. But on application of the petitioners, who filed exceptions to the order, the hearing was reopened and consolidated with a hearing on proposals for standards for neufchatel, cottage and creamed cottage cheeses. This hearing resulted in a final order of December 22, 1942, which substantially rejected petitioners' arguments in favor of standards which would allow lower fat and higher moisture content in the manufacture of these cheeses.

The regulations, Code of Federal Regulations, Title 21, Pt. 19, which are now under attack are in substance as follows: Sec. 19.515 requires that cream cheese contain by weight not less than 33% of milk-fat and not over 55% of moisture; that it must be made from a pasteurized starting mixture of cream with milk or skim milk or both, to which may be added lactic acid producing bacteria; that it may be "hot-packed" and that designated moisture-retaining gums, not to exceed 0.5% by weight, may be used provided the presence of these gums is stated on the label. Cream, milk or skim milk or a mixture of two or all of these may be used if the product is "hot-packed"; and water, since it was not specified, may not be used. Sec. 19.520 sets the standard for neufchatel cheese and prescribes that the manufacture and basic ingredients be the same as cream cheese except that the milk fat content may vary from 20 to 32% inclusive and a moisture content up to 65% is allowed. Sec. 19.525 requires that cottage cheese have a moisture content of no more than 80% and that it be made from pasteurized sweet skim milk; and by Sec. 19.530 creamed cottage cheese must contain no

more than 80% by weight of moisture and must be made so that at least 4% of milk fat is added by "mixing cottage cheese with pasteurized cream or a pasteurized mixture of cream with milk or skim milk or both."

The questions presented on this review are whether the Administrator's definitions and standards of identity, establishing the fat and moisture content of cream and neufchatel cheeses are supported by substantial evidence of record; are reasonable definitions and standards of identity; will promote honesty and fair dealing in the interests of consumers; and establish definitions of the foods in question under their common names so far as is practicable; whether the standards which fail to provide for the addition of water in the "hot-pack" process of manufacture of cream and neufchatel cheeses are reasonable and based on substantial evidence; whether the cottage cheese standard, which requires the use of pasteurized skim milk, is valid under the Act and whether the standard requiring a maximum of 80% moisture content is based on substantial evidence; and finally, whether the creamed cottage cheese standard, which calls for the addition of milk fat after the making of the curd, and not before, is valid.

[1] It will be helpful to state at the outset that the scope of review of an order of the Administrator of the Federal Food, Drug and Cosmetic Act is necessarily limited, as Federal Security Administrator v. Quaker Oats Co., 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed.—shows clearly enough, and does not allow the substitution of the court's judgment, even though the court on the same record might reach a conclusion different from that of the Administrator. The order of the Administrator must, therefore, be affirmed if it is supported by substantial evidence of record and is within statutory and constitutional limitations. The question, then, presented by this review is largely one of

determining whether the Administrator's findings were supported by the evidence, and whether his order conformed to the statutory purposes of the Act.

The Administrator found that there are produced and marketed various cheeses of a soft uncured nature, but that these cheeses, while they have similar characteristics, have separate and distinct identities. These cheeses have the same basic constituents (coagulated proteins of milk, soluble nonfat milk solids, and varying proportions of water and milk fat) and it is by changing the proportions of the basic constituents in the starting mixture that the differences in characteristics are obtained. Of these soft uncured cheeses cream cheese was found to be the relatively high-fat, low-moisture cheese, containing traditionally from 35 to 40% or more of fat and 35 to 50% or less of moisture, although in good commercial practice the percentages might vary 2% above or below what the manufacturer sought to obtain.

One of the problems in the manufacture of cream cheese has been the leakage of moisture, which renders the cheese less attractive and correspondingly less merchantable. But in 1927 or thereabouts it was discovered that moisture leakage could be largely prevented by the addition of harmless vegetable gums, such as carob or locust bean gum, or karaya gum, or tragacanth gum; and it was found that the use of these gums for this purpose, up to 0.5% by weight, could not be abused when the moisture content of cream cheese is restricted. But following the discovery that gum could be used to prevent leakage it became the practice of many manufacturers to heat the gum and curd together so as to disperse the gum in the curd, by homogenization, and it became possible by this "hot-pack" process to raise the moisture and lower the fat content of the cheese without losing the appearance and texture of cream cheese. Thus it was found that most of the cheese made by this

process contains from about 23 to 30% of fat and from about 60 to 65% of moisture, whereas cheeses with the same percentage of fat and moisture made by the older method of manufacture would have a softer texture than that which was found to be the traditional cream cheese. It was also found that the desired percentage of fat and moisture in the "hot-pack" process could be obtained by adding the proper amounts of cream or milk or skim milk, or any combination of these, before the curd is heated and homogenized; and that water has also been used for this purpose, although skim milk can be used to accomplish anything that water does in moisture adjustment.

Consumers, it was found, cannot readily distinguish between the cream cheese made by the older process and the lower-fat, higher-moisture cheese made by the "hot-pack" process; and since fat content is the chief item of expense in such cheeses retailers sometimes sold the cheaper product as "cream cheese" which was natural enough since consumers, unlike manufacturers, wholesalers and retailers, were not always acquainted with or informed of the esoteric terms of qualification used in the trade, such as "low test," "cheap," "second grade," "No. 2," or as often as not by some arbitrary brand name. The cheaper product being sold consumers was found by the administrator to be more closely akin to neufchatel cheese, which was found to be the common or usual name of a cheese made by the same process as cream cheese, but having a fat content of a minimum of 20% and a moisture content of a maximum of 65%. This type of cheese, prior to about 1920, was marketed in substantial quantities, but gradually the market declined until it almost vanished because of a progressive cheapening of the product in quality.

The findings in respect to the cottage cheese group were, briefly, as follows: cottage cheese is made from skimmed milk in just about the same way as cream cheese is with

a starting mixture that is usually something less than 1½% of milk fat and something less than 80% of moisture. A moisture content of no more than 80% was, therefore, found to be reasonable. By adding milk fat (4% was found to be reasonable) the product known as creamed cottage cheese can be obtained. This group of cheeses like cream cheese and neufchatel, was found to be highly perishable because of the growth of bacteria, yeasts and molds, which could to some extent be stopped by pasteurization of the starting mixture, to which is then added lactic acid producing bacteria. These bacteria develop independently of the others and account for the eventual spoilage of the cheese. Some manufacturers have added chemicals to slow down the spoilage, but this was found to be uncommon as a trade practice, since consumers are generally acquainted with the process of spoilage and do not buy soft uncured cheeses in such quantities as to make this a real problem. Based on these findings the Administrator issued the regulations already referred to.

[2] One of petitioners' chief objections to the regulations promulgated by the Administrator is that a substantial portion of the cheese manufactured by them must be designated as neufchatel cheese. This follows from the fact that much of their cheese contains 25 to 30% of milk fat and 57 to 61% of moisture. Petitioners take the position that the name neufchatel fails properly to identify their product and that it will mislead consumers; that it is foreign sounding, not easy to pronounce and has fallen into disrepute and dislike because of an inferior product formerly marketed under the name; that it imposes an unreasonable hardship on a whole industry; and that it will drive a wholesome product from the market. And they suggest that the Administrator would have done better if he had used the designation cream cheese with some

sort of qualification such as Grade B or No. 2. But it is not our function, as has been pointed out before, to substitute our judgment of what might be a proper name for that of the Administrator. He chose the designation neufchatel; and there was substantial evidence to support such a choice. One witness, Stine, testified, for example, that consumers would be misled if the cheaper product continued to be labeled as cream cheese and he therefore recommended neufchatel as a good name. Moreover, there were findings supported by the evidence that neufchatel had been the name of that group of soft uncured cheeses which was next below the high fat content cheese commonly known as cream cheese. It was therefore within the power of the Administrator to identify cheeses of the kind that the petitioners make with the name he did. The fact that neufchatel had fallen into disrepute in the 1920's is of no particular significance so long as he could find, as he did, that cheese made with a fat content of below 33% and with a moisture content of above 55% was not the product cream cheese as it was traditionally known. Nor does petitioners' assertion that these standards of identity will create a monopoly for one manufacturer make the order unlawful. If they continue to make the product they now make, they can sell it as neufchatel; and if they want to make a product that they can sell as cream cheese, they need only comply with the standards of the product that the Administrator has identified as cream cheese.

[3] The petitioners also argue that the Administrator did not use the name, so far as it was practicable, which commonly identified the product sold; and that in the absence of a specific finding that it was not practicable to label their product cream cheese, the regulations identifying these various groups of cheeses must fall. The practicality of one name or another name is not, of course,

a matter for our judgment. Even though the name chosen would drive a healthful product from the market, or depress existing standards of a product now being marketed, that name or the name withheld from a product cannot be said by us to be unreasonable or improper so long as there were findings and substantial evidence to support them which justified the action of the Administrator. And there were such findings.

[4] The many findings attacked by the petitioners as unsupported by substantial evidence are, as we have already intimated, supported by enough evidence so that they must stand even though this court on the same record might have reached a different conclusion. See Federal Security Adm'r v. Quaker Oats Co., 318 U. S. 218, 228, 63 S. Ct. 589, 87 L. Ed.—. Findings 20, 23 and 37, which cover the fat and moisture contents of cream cheese, are supported by evidence, somewhat contradicted to be sure, but nevertheless substantial, that much, if not most of the cream cheese sold before the discovery of the "hot-pack" process contained from 35 to 40% of fat and from 55 to 50% of moisture. And the Administrator also justifiably found that when the fat content went down and the moisture content up the appearance, smell, feel and taste of the resulting product became less characteristic of cream cheese as consumers knew it, although the demarcation was not easy to define. He, therefore, found it reasonable to fix 33% of fat content or above as the proper figure for identifying cream cheese; and this figure was arrived at by allowing a 2% variation in the process of manufacture. And he set the maximum moisture content at 55%, which as the petitioners point out, was peculiar to say the least since a 2% variation was not allowed in this constituent of the product. But his decision on this score is supported by finding 22 which shows that a product of

more than 55% of moisture, if not subjected to the "hot-pack" process, acquires different but closely related characteristics of cream cheese. That determination was not unreasonable in view of the evidence of leakage if the moisture content exceeded this amount in the absence of the use of moisture retaining gums. The finding that water was sometimes used by manufacturers in adjusting the moisture content, but that skim milk could accomplish the same result, and was therefore prescribed, was also supported by evidence that in good commercial practice water was not used. The Administrator could believe this if he chose because, as we reiterate, it is his judgment and not ours that must be given effect when based upon facts in evidence. As to the finding that the cheaper product was not accompanied by a uniform differentiation in price, the evidence was again conflicting but yet substantial. That is likewise the case with findings 11 and 41 which relate to the fat content of the starting mixtures.

[5-7] The findings and regulations in respect to cottage and creamed cottage cheeses must also be upheld on the evidence in this record. The prescription of a moisture content of no more than 80% was based on substantial evidence that most cottage cheese in good practice contained no more than this and usually contained less. As to the requirement of pasteurization, this was supported by evidence and findings that it was usually done and that it prevented spoilage to some degree in a highly perishable product by killing bacteria, yeasts and molds not necessary to the manufacture of the cheese. And the regulation requiring the addition of 4% of fat to the curd after the making of the curd, instead of before, was not unreasonable. Even though some manufacturers might prefer to use a process differing from the one required, it was permissible on the evidence for the Administrator to con-

clude that good commercial practice and a proper identification of the product called for in the addition of fat after the formation of the curd since there was evidence that the resulting product was different.

Bound as we are by these adequately supported findings of the Administrator, Federal Security Adm'r v. Quaker Oats Co., supra, his action based upon them cannot be disturbed.

Affirmed.

SWAN, Circuit Judge (dissenting in part).

I am unable to agree with my brothers that the order should be in all respects affirmed.

For many years cheese having less than 33% of milk fat has been sold as "cream cheese." Almost every one in the industry, with the exception of the Kraft Cheese Co., objects to the requirement that such cheese hereafter be called "neufchatel." The statute, 21 U.S.C.A. § 341, authorizes the Administrator to promulgate regulations "establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity," etc. There is no finding that it is impracticable to use the common name and distinguish between cheese of different milk fat content by adjectives, for example, light cream cheese or heavy cream cheese. Without at least a finding of impracticability. I think it unreasonable to deprive the bulk of the industry of their good will in the commonly used name.

Next, take the standard of 33% fat and 55% moisture. Finding 21 says that in good commercial practice the percentages of fat and moisture vary as much as 2% above or below. In recognition of such variation the 35% for fat (Finding 20) was dropped to 33%, but the 55% for moisture was not raised to 57%. This seems to me an arbitrary disregard of Finding 21.

Appendix C.

As to the prohibition against adding water in the "hot-pack" process, there is a finding that water is sometimes used (Finding 27) and no finding of any reason why that practice must be discontinued. I think the findings fail to support this part of the order.

As to the cottage cheese the Administrator ignored the evidence as to the use of unpasteurized skimmed milk. He made no finding on the subject. The right to present evidence is a barren one if the trier of fact may fail to consider it. See A. E. Staley Mfg. Co. v. Secretary of Agriculture, 7 Cir., 120 F. 2d 258, 261. I would send the case back for findings before approving this part of the order.

I agree that the order is supportable in so far as it relates to creamed cottage cheese.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 246

BRUNETTO CHEESE MANUFACTURING CORP., C. & F. CHEESE DISTRIBUTORS, INC., FALCONE DAIRY PRODUCTS, INC., J. J. GIAMMALVO, INC., M. MAGGIO CO., POLLIO DAIRY PRODUCTS CORP., SORRENTO CHEESE COMPANY, INC., SUNBURY CHEESE COMPANY, INC., AND ITALIAN FRESH CHEESE MANUFACTURERS ASSOCIATION, INC., PETITIONERS

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 25-28) is reported at 356 F. 2d 874.

JURISDICTION

The judgment of the court of appeals was filed on February 4, 1966. A petition for rehearing was denied on March 23, 1966. The petition for a writ of certiorari was filed on June 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether regulations issued under the Federal Food, Drug and Cosmetic Act, Section 401, establishing definitions and standards of identity for mozzarella cheese (21 CFR 19.600) and low-moisture mozzarella cheese (21 CFR 19.605) are adequately supported by substantial evidence of record.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*, provides in pertinent part:

Section 401 (21 U.S.C. 341)

> Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * *.

Section 701 (21 U.S.C. 371).

(e)(1) Any action for the issuance, amendment, or repeal of any regulation under section 401, 403(j), 404(a), 406, 501(b), or 502(d) or (h) of this Act shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity to present their views thereon, orally or in writing. As soon as practicable thereafter, the Secretary shall by order act upon such proposal and shall make such order public. Except as provided in paragraph (2), the order shall become effective at such time as may be specified therein, but not prior to the day following the last day on which objections may be filed under such paragraph.

(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Until final action upon such objections is taken by the Secretary under paragraph (3), the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made. As soon as practicable after the time for filing objections has expired the Secretary shall publish a notice in the Federal Register specifying those parts of the order

which have been stayed by the filing of objections and, if no objections have been filed, stating that fact.

(3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based. The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court of the Secretary or other officer designated by him for that purpose. The

Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28, United States Code.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such or-

der of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

* * * *

STATEMENT

1. Petitioners seek review of the judgment of the Court of Appeals for the Second Circuit sustaining an order by the Deputy Commissioner of Food and Drugs (29 F.R. 18121, Pet. 28-41)[1] establishing, by separate regulations, standards for "mozzarella cheese" and "low-moisture mozzarella cheese."[2] By

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[1] Authority vested in respondent, the Secretary of Health, Education, and Welfare, under the Act is delegated to the Commissioner of Food and Drugs; the Deputy Commissioner of Food and Drugs is redelegated the authority to perform all of the functions of the Commissioner. 21 CFR 2.90-2.91. Thus, all actions taken in this proceeding either by the Commissioner or Deputy Commissioner of Food and Drugs were pursuant to authority conferred by the Secretary.

[2] The order also establishes standards for part-skim mozzarella cheese (21 CFR 19.601) and part-skim low moisture mozzarella cheese (21 CFR 19.606). The part-skim products conform to the standards in question, except that the milk-fat content is less.

Regulation 19.600, the so-called "eastern" type cheese, as made by petitioners, is to be called "mozzarella cheese" and is required to contain between 52 percent and 60 percent moisture. Another product, the so-called "midwestern" type cheese, pursuant to Regulation 19.605, is to be called "low-moisture mozzarella cheese" and is required to contain between 45 percent to 52 percent moisture.

The proceedings were initiated in 1957 by a petition by the National Cheese Institute seeking the establishment of a definition and standard of identity for mozzarella cheese, which was initially denied (22 F.R. 428, January 23, 1957; Ex. 1). After public hearings in 1958, tentative findings of fact and a tentative order were published in the Federal Register on July 22, 1961 (26 F.R. 6599; Pet. App. 41-46), establishing definitions and standards of identity for the two types as "mozzarella cheese" and "pizza cheese". Firms, individuals, and associations filed exceptions. After consideration of the exceptions, the final order was published in the Federal Register of December 22, 1964.

2. The evidence on which the Regulations were based may be summarized as follows:

There are two types of cheese which have been manufactured, distributed, and purchased by consumers in the United States under the name, "mozzarella" (Findings 8, 10; Pet. App. 34-35, 36-37). These are referred to in the trade as the "eastern" and "midwestern" types (Findings 2, 8; Pet. App. 31, 35).

The "eastern" type, manufactured and distributed by petitioners, was developed to fill the demand created by Italian immigrants settling in eastern cities (R. 16a). This cheese was made in the United States as early as 1900 (R. 16a; Finding 2; Pet. 30). The manufacturing procedures followed in general those that had been developed for the manufacture of mozzarella in Italy (Finding 2; Pet. 30). This "eastern" mozzarella contains moisture in the range of from 52 to 60 percent (Finding 4; Pet. App. 32). Due to this high moisture content, its shelf-life is at most a month (R. 169b-170b, 172b), and it is distributed mainly in eastern cities, rather than nationwide (R. 69b, 70b; Findings 2, 8, 10; Pet. App. 30-31, 34, 36).

The "midwestern" type was developed before World War II and was originally called "Scamorza" (R. 11b, 12b)[3] or "Mozzarella" (R. 123b). The great volume of manufacture and distribution of the "midwestern" type developed after World War II to fill the nationwide demand for mozzarella created by the widespread post-war popularity of "pizza." Mozzarella was one of the ingredients generally recommended in recipe books for pizza (R. 119b). The "midwestern" cheese, since the advent of pizza and the pizzarias, has been labeled, sold, and accepted by consumers as mozzarella (*e.g.*, R. 12b, 83b, 149b, 88a, 90a; Findings 8, 10; Pet. App. 34-35, 36). The "midwestern" mozzarella contains moisture between

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[3] All at the hearing agreed that scamorza is a certain shape of mozzarella cheese; all scamorza is mozarella, but not all mozzarella is scamorza (see, *e.g.*, R. 128a-129a, 15a, 118b).

45 percent and 52 percent (R. 13b, 99b, 100b, 107b-108b, 144b; Finding 9; Pet. 35). Due to this lower moisture content, it has a far longer shelf-life (R. 131b-132b, 158b-159b), and is distributed nationwide (Findings 8, 10; Pet. 35, 37; R. 88a, 90a, 12b, 22b, 68b, 70b, 74b-76b, 83b-84b, 102b, 106b-108b, 111b, 115b, 116b, 119b-120b, 125b, 128b, 136b, 144b-145b, 149b).

Based upon this evidence, the Commissioner established two separate standards for the two separate products which were known to the public as mozzarella cheese. The Commissioner found that the significant difference between the two products was their moisture content (Finding 10; Pet. 37) and, accordingly, established standards for "mozzarella cheese" and "low-moisture mozzarella cheese."

ARGUMENT

1. It is not disputed that the eastern and midwestern types of cheeses here involved are different and should be separately classified. Petitioners' argument is that only the eastern type, which they manufacture, is genuine mozzarella,[4] and that the

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[4] Petitioners' assertion that their cheese is the "genuine" product (Pet. 11) is not entirely correct. A good many changes have been made from the original methods used in Italy, such as the use of cow's milk instead of water buffalo milk; pasteurization of milk; refrigeration of curd; addition of starter; use of mechanical equipment; use of partly-skimmed milk for some grades; and the change from paste rennet to liquid rennet because of flavor problems (R. 159b, 161b-166b). The "genuine" product, a very high moisture cheese (approxi-

midwestern product ought not be allowed to use the term mozzarella at all. They contend that since the midwestern type has never been called low-moisture mozzarella, it has not been standarized under its common or usual name so far as practicable, as required by the statute.

Their argument overlooks the fact that the evidence showed, and the Deputy Commissioner found, that the midwestern product was "generally represented to be and labeled as 'mozzarella'" (Pet. App. 36). The authority of the Secretary under Section 401 of the Federal Food, Drug, and Cosmetic Act is not, as petitioners assume, limited to gathering information as to the historical composition of foods and incorporating only that information into standards for their identity. His function is to establish standards which will promote honesty and fair dealing in the interest of consumers. Such standards by their very nature include some products and exclude others, or exclude or limit some ingredients that may be in commercial use. The American public's interest is in the establishment of "standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive" (*Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 228-232). The Federal Food, Drug, and Cosmetic Act does not restrict this concept to the interest of any particular

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mately 65 percent moisture) sold out of water, is not affected by the standard since it is suitable only for local sales (R. 64b).

section or segment of the country. Petitioners' contentions have as their foundation the fundamentally fallacious argument that only the Eastern consumer —and, particularly, the Italian community in New York State—has an interest in this matter. As the Court below pointed out, "the consuming public was not confined to the east." (Pet. App. 27). The Commissioner could properly authorize a standard which defined for the country as a whole the product commonly known, purchased, and accepted as mozzarella cheese. The name "low-moisture mozzarella" is an appropriate and reasonable designation for the midwestern product which has been sold throughout the nation as mozzarella cheese but which is in some measure distinguishable from the mozzarella cheese as it has been made for a longer time in the eastern states.

The name "mozzarella" was retained for the soft, high moisture type of cheese which had long been familiar to the Italian-American customer. The low-moisture name advised the consumer of the essential difference between the two types. Since the name chosen has a rational basis and is consistent with the statutory purpose of promoting honesty and fair dealing in the interest of consumers the court below properly declined to substitute its judgment for that of the Commissioner. *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218. The fact that the Commissioner might also properly have chosen another name for the low-moisture mozzarella (cf. *Columbia Cheese Co.* v. *McNutt*, 137 F.2d 576 (C.A. 2, certiorari denied, 321 U.S. 777, cited by petitioners

at Pet. 17) is of no significance so long as the name he did choose is appropriate.[5]

Petitioners' contention that the standard must fall because of an asserted conflict with the standard for mozzarella cheese promulgated by New York State (Pet. 13-14) is without merit.[6] State enactments cannot override federal regulations promulgated under constitutional authority. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197.[7]

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[5] Petitioners imply that this is the only standard in which the name of the cheese is couched in terms of moisture. Another example of differentiation between types of cheeses in terms of moisture are the standards for "monterey cheese," "monterey jack cheese" (21 CFR 19.580) and "high moisture jack cheese" (21 CFR 19.585).

[6] Equally irrelevant is the fact that the standard accords with the mozzarella-cheese standard promulgated by the State of California (Pet. 5).

[7] It does not appear to us that the practical problems in New York are as great as petitioners would make them appear. If the low-moisture cheese is labelled "low-moisture mozzarella—pizza cheese" it would seem to meet both New York and federal standards. In all events, petitioners can hardly complain that the manufacturers of the midwestern type cheese might be excluded from the New York market.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 227026 99